No. 96-1898

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1996

MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, INC.
Petitioner,

V.

AMERICAN BAR ASSOCIATION, ET. AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

Stephen M. Shapiro
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 701-7327

Lawrence R. Velvel
Counsel of Record
Massachusetts School of Law
500 Federal Street
Andover, Massachusetts 01810
(508) 681-0800

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REPLY BRIEF FOR PETITIONER

A. ANTITRUST IMMUNITY

1. Both by what it says and what it does not deny, the Brief in Opposition ("Opposition") brings into focus what is at stake here, both for the important field of legal education and for dozens of other professional and business fields involving billions of dollars in commerce annually.

The Opposition does not deny that the Council of the Section of Legal Education and its Accreditation Committee, which make the ABA's accreditation decisions, were captured by economically self-interested academics, or that the captors forced all schools desiring accreditation to adhere to an overall conspiracy which promoted the economic interests of the professoriate in higher salaries and better terms and conditions of work. The Opposition does not deny that the accreditors operated secretly, and used secret rules and procedures that were kept hidden even from the ABA's House of Delegates and Board of Governors. These matters *cannot* be denied: they are the very facts that were found by the Department of Justice ("DOJ") after extensive investigation and that underlie the consent decree entered against the ABA.

The Opposition does not deny that, to enforce their anticompetitive conspiracy, the accreditors used arbitrary procedures, while stacking committees and site evaluation teams. The Opposition does not deny that the terms of the conspiracy stifled competition among ABA-accredited schools and from outsiders seeking accreditation, causing increases in costs and *associated increases in tuition that amounted to thousands of dollars per year per student*. Nor does the Opposition deny that several of these terms were used to deny MSL accreditation.

The Opposition does not deny that state courts did not authorize or supervise the accreditors' conduct, and did not

even know of numerous anticompetitive actions. The Third Circuit could cite no petitions, briefs, letters, conversations, lobbying efforts or other normal methods of petitioning by which the ABA ever petitioned any court for approval of anticompetitive rules and actions challenged by the DOJ and MSL, or explained to courts why restraints of trade were necessary or described the restraints' anticompetitive purposes.[1] The Opposition admits that all the ABA did by way of purported "petitioning" was to send courts a list of accredited schools.[2]

The Opposition thus does not dispute that economically self-interested actors enforced a secret conspiracy to impose economic terms and conditions beneficial to themselves, and that state courts had no input into and no knowledge of anticompetitive actions. Rather, as the Chairman of the Council twice acknowledged recently, the courts simply gave the ABA an "unwritten, implied delegation" of power to decide who can take bar examinations. (App. 280, 2082.)[3]

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[1] The Opposition does not defend the Third Circuit's obviously incorrect ruling that a newspaper interview and an internal ABA debate were indirect petitioning of government.

[2] When the District Court asked the ABA to produce any opinions or advice it gave any court since 1981 relating to who can take bar exams, the ABA admitted "it has no [such] documents." (App. 3617.) Lacking such evidence, the ABA now says the Third Circuit relied on alleged MSL admissions of petitioning. But MSL consistently has contended that there was no petitioning for approval of the challenged restraints, adopted in and after 1973; the only petitioning occurred mainly in the 1920s and 1930s, decades before adoption of the restraints.

[3] In 1983 the Council likewise stated, as shown in a document lodged with the Third Circuit, that it acts under a "delegation" of power "to approve and accredit law schools." Similarly, numerous state judicial opinions have acknowledged that courts give the ABA carte blanche to make decisions. See, e.g., *Appeal of Kartorie*, 406 A.2d 746 (Pa. 1979); *Application of Nort*, 605 P.2d 627 (Nev. 1980); *Application of Schatz*,

2. In a monograph published by the ABA's Section of Antitrust Law, the authors correctly state that "courts tend to deny immunity" under both the state action and *Noerr-Pennington* doctrines "if governmental involvement has been especially narrow or superficial," as here. ABA Antitrust Section, *The Noerr-Pennington Doctrine*, 106 (1993). Yet the ABA — which repeatedly told the District Court it was *not* relying on the state action or petitioning doctrines[4] — now claims both such immunities under the Third Circuit's decision. That decision *concededly* jettisons this Court's requirements of clear authorization and close supervision for state action immunity, as well as the conditions laid down in *Allied Tube* for petitioning immunity. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 502-510 (1988). The Third Circuit instead concluded that blanket immunity exists because state bodies took *some* action giving force to the Council's private conspiracy: here that action was the rule requiring accreditation before law school graduates can take bar examinations in over 40 states. Without this rule, ABA accreditation would have far less anticompetitive effect — many schools could ignore the accreditors, as occurs in fields where accreditation and professional licensure are *not* tied together — and law school accreditation would not be, as the DOJ has described it, "critical to the successful operation of a law school." (App. 2876.) According to the Third Circuit, the mere taking of *some* action by courts, and the mere sending to courts of a list of accredited schools, totally absolves the ABA from all liability, even liability for stigmatic injury to which the bar examination rule did not contribute.

The Third Circuit's decision creates great dangers for the

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497 P.2d 153 (Wash. 1972); *Application of Urie*, 617 P.2d 505 (Alaska 1980); *LaBoissiere v. Florida Board of Bar Examiners*, 279 So. 2d 288 (Fla. 1973).

[4] District Court Dkt. Nos. 235, pp. 13-16; 255, pp. 36-38.

economy. The Opposition does not deny that there are many fields in which governmental bodies in some way use, and thereby give force to, private groups' rules on who can enter professional fields and what products can be marketed. In all such cases, economically self-interested persons will be able to impose restraints which destroy competition and innovation for their private benefit, and will be able to do so secretly. Yet the self-interested actors will be immune from liability.

The Third Circuit's decision conflicts with this Court's decisions. This Court has consistently recognized the danger in "hybrid" situations where governments "merely enforce private . . . decisions." *Fisher v. Berkeley*, 475 U.S. 260, 268 (1986). Thus, where government takes some action giving force to private regulatory decisions, this Court has rejected state action immunity unless states clearly authorize and closely supervise the private anticompetitive conduct. The state must play "a substantial role in determining the specifics" of the anticompetive conduct; it cannot merely "cas[t]. . . a gauzy cloak of state involvement over what is essentially a private [agreement];" and immunity requires that *"particular anticompetitive mechanisms* operate because of a deliberate and intended *state* policy." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635, 636 (1992)(emphasis added); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980).

This Court's decisions are intended "to ensure that private parties could claim state-action immunity. . .*only when their anticompetitive acts were truly the product of state regulation"* (*Patrick v. Burget*, 486 U.S. 94, 100 (1988)(emphasis added)), and require courts to distinguish situations where the *state* determines that there should be specific restraints on trade from situations where *private parties* do so. The Third Circuit's decision eradicates this

fundamental distinction.[5] *The decision ousts antitrust review, and destroys its important function of checking private anticompetitive acts which are not overseen by the state. Private parties are left free to destroy competition with impunity.* Significantly, the Opposition does not deny that both private and governmental antitrust enforcement are precluded by the Third Circuit's ruling.

This Court has also rejected *Noerr* immunity where, as here, the context is anticompetitive action "within the confines of a private standard-setting process" by economically self-interested actors who benefit from stifling competition and use improper procedures to achieve their aims. *Allied Tube, supra* at 506. In such cases, the Court said, the conduct at issue is not "'political,'" but rather is "commercial activity with a political impact." *Id.* at 507. Here, of course, secret conduct within a private process was used for the economic purpose of obtaining better salaries and terms and conditions of work.

3. The Opposition's efforts to evade this Court's decisions are untenable. In state action immunity cases, private agreements were *not* independent and self-executing, but often depended entirely on state rules for effectiveness. For example, in *Schwegmann Bros. v. Calvert Distillers*, 341 U.S. 384 (1951), and *Midcal, supra*, privately created price restraints could have been ignored but for state rules requiring adherence. In *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), state approval was required before the private light bulb program could be undertaken. In *Ticor, supra*, state approval was required before private agreements could be

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[5] In *Hoover v. Ronwin*, 466 U.S. 558 (1984), this Court repeatedly emphasized that the *state court* made the substantive decisions. As stated by Professor Elhauge, "the state supreme court knew and controlled the number of attorneys permitted to enter the profession, *and thus controlled the terms* of the restraint being challenged." Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 668, 694 (1991)(emphasis added).

implemented.

Also untenable under this Court's cases is the contention that all stigmatic injury to MSL is immunized as purportedly "incidental" to petitioning. The Opposition does not deny that, as shown by the evidence, MSL suffered massive damage from heavily declining enrollments attributable to stigmatic injury. Even persons who live and wish to practice in states where MSL graduates can take bar examinations — the type of persons who heavily predominate at MSL — refuse to attend MSL because of reputational injury stemming from denial of accreditation by the national organization which purports to speak for the entire legal profession. This result is congruent with economic theory and common sense, since, as the DOJ said in its *amicus* brief below (at pp. 26-27), consumers rely on professional associations in order to make judgments on complex subjects such as legal education.

As explained in our Petition, however, *Allied Tube* rejected the view that stigmatic injury is "incidental" to petitioning where it stems from economically self-interested anti-competitive action by private persons acting in a private association to further their own interests, rather than in an open political debate in the public arena. *Id.* at 500, 506-507. This holding is all the more applicable where, as here, secrecy rather than disclosure characterized the actions of the defendants, and the purported "petitioning" was only *ex cathedra* presentation of a list of approved schools.

In its *amicus* brief below (at 10), the DOJ also expressed serious concern over expansion of petitioning immunity to protect actions "unrelated to the rationale of *Noerr*," which "is intended to protect the right of the populace to petition the government." *Id.* at 11. *Noerr* thus should not be used (as here) to protect "standards . . . promulgated and applied by economically interested parties who possess the ability to raise barriers to entry or to destroy a rival's ability to compete by misleading consumers" (*id.* at 27), or the ability to "'grossly manipulat[e] public or consumer ignorance for the competitive

and economic advantage of the collaborators . . . .'" *Id.*

The DOJ further explained that immunizing a defendant merely because its "conduct also had an effect on governmental action, *whether or not the private conduct constituted petitioning*, represents a serious and unwarranted expansion of *Noerr*." *Id.* at 8 (emphasis added). Here, the only purported "petitioning" was the sending of a list, and extensive stigmatic injury arose apart from such "petitioning."

The DOJ's position, unlike the Third Circuit's, was that "[t]he First Amendment does not provide blanket protection to restraints of trade effectuated through speech" (*id.* at 8) lest "'[s]uch an expansive interpretation of the constitutional guaranties of speech and press . . . make it practically impossible ever to enforce laws against agreements in restraint of trade . . . .'" *Id.* at 19. This result obtains here under the Third Circuit's decision because, to use the DOJ's words, the accreditors "impair[ed] competition by materially hindering the ability of [the innovative, low cost MSL] to compete and thereby materially diminish[ed] competition...." *Id.* at 28.

4. In addition to contradicting this Court's decisions and views expressed by the DOJ, the Third Circuit's decision is contrary to views expressed by leading commentators. Professor Hovenkamp has said that,"at the very least, before a body can qualify as part of the 'state itself' and thus not be in need of supervision, the effective decision makers must be economically independent of the conduct they are regulating." Hovenkamp, *Federal Antitrust Policy*, 682 (1994). Professors Areeda and Hovenkamp have said that,"when governmental power is placed in essentially private hands — as in a committee of the bar or in a state agency whose officials are themselves essentially full-time participants in the regulated industry — we ask whether the agency is 'really' private or whether the state has left it very little discretion and actually or virtually 'compelled' its decision." "Without reasonable assurance that the body is far more broadly based than the very persons who are to be regulated, outside supervision

seems required." Areeda and Hovenkamp, *Antitrust Law* (1996 Supp.) 198, 206. Professor Elhauge has repeatedly stated that the relevant "focus [is] on whether the decision-makers controlling the restraints are financially interested." Elhauge, *supra* at 703. And Professors Inman and Rubinfeld state that there must be "[a]ctive legislative supervision of regulatory decisions made by private firms," insuring that state officials not only articulate governing policy but also "have a say in its implementation." Inman and Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine*, 75 Tex. L. Rev. 1203, 1261 (1997). The Third Circuit's decision sweeps aside all these principles.

B. DISCOVERY AND DISQUALIFICATION

The Opposition confirms that review of the second question presented is appropriate for complete relief. For example:

• In antitrust, evidence of liability is normally in the hands of defendants, and conspiracies are proven by obtaining discovery of the actions by which defendants enforced a conspiracy against members of an industry. The DOJ obtained such discovery. Then, as testified to DOE by the present head of the Antitrust Division, "faced with the evidence the [ABA] quite frankly quite quickly concluded that it was prudent to restructure the process." (*Hearings Before The National Advisory Committee Of DOE*, November 28, 1995, p. 55.) MSL, however, was denied discovery showing the conspiracy even though the Opposition *does not deny* that numerous terms of the conspiracy were used to deny MSL accreditation.[6] This Court should decide whether a plaintiff can be denied discovery of evidence proving the conspiracy it

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[6] *E.g.*, the arbitrary, job-creating student-faculty ratio, limitations on hours of teaching, limitations on types and amounts of work, the requirement of paid leaves of absence, and the requirement of elaborate physical facilities. And MSL concededly was boycotted.

charges.

- The Opposition does not deny that MSL's salaries would have been *an explicitly stated* ground of denial of accreditation had MSL not raised them to levels demanded by the conspirators, and thereby incurred increased costs. This Court should reaffirm its rule that a party which has met conspirators' requirements, and thereby was injured, has a cause of action. *Kelly v. Kosuga*, 358 U.S. 516, 519-521 (1959); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 137-141 (1968).
- Eschewing reliance on arguments made below, the Opposition argues that disqualification of the counsel best able to represent MSL should be upheld because substitute counsel did not descend to the level of incompetence. This unprecedented theory would destroy the right to counsel of one's choice in the federal courts, and should be rejected.

CONCLUSION

Although the Opposition does not deny fundamental points showing what is at stake in this case, it uses a technique used by the ABA against MSL in every court: it opens by lauding ABA accreditation, calling accreditation "a central concern of the ABA" since 1878, portraying MSL as violating 11 accreditation standards, and assailing MSL's alleged litigation and financial strategies. The truth, however, is quite different from this attempt to trade on the ABA's 120 years as the national association of lawyers and its 75 years as an accreditor (roughly half this period as a monopolist).

Because MSL blew the whistle on the antitrust conspiracy imposed by the Council and the Accreditation Committee, almost every one of the practices it objected to has now been found invalid by the DOJ or the DOE. These practices arose because, far from accreditation being a "central concern" of the ABA, "law school accreditation is, in fact, a minor part of what the ABA's members are concerned about," as testified

to DOE by the present head of the Antitrust Division. (*Hearings*, *supra* at 56.) "As a result" accreditation was "captured by the people who were actually immediately affected by it" and who "further[ed] their own . . . guild concerns at the expense of the legitimate accreditation issues." *Id.* at 57.

For the ABA to permit this capture and use was contrary to the decision in *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982). There, this Court recognized that a standards-setting body is "'in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce,'" rules which "'may result in economic prosperity or economic failure'" for a host of institutions. *Id.* at 570. The Court therefore ruled trade associations liable for the actions of subgroups, because this would encourage the parent associations to control the subgroups. But the ABA, ignoring *Hydrolevel*, neglected such control for over a dozen years afterwards.

The result is that an innovative school like MSL, which pioneered in teaching practical skills, charging low tuitions, and making education available to people of limited means, was subjected to extensive financial injury by the accreditors. They stigmatized it and, exercising monopoly power, disabled its graduates from taking bar examinations in over 40 states, either permanently or until long years after graduation. The Third Circuit, however, has completely immunized the accreditors and the parent ABA in a decision which contradicts this Court's holdings and threatens other segments of the economy. Certiorari should be granted to reaffirm this Court's rulings (including *Hydrolevel*) and belay the danger to the economy.

Respectfully submitted,

Stephen M. Shapiro
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 701-7327

Lawrence R. Velvel
Massachusetts School of Law
500 Federal Street
Andover, Massachusetts 01810
(508) 681-0800
Counsel for
Massachusetts School of Law